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No. 89-1632

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

HODARI D.,
Respondent.

On Writ of Certiorari to the California Court of Appeal for the First Appellate District

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does flight by itself justify a *Terry* stop?

2. Has a person who flees from police been "seized" before the police acquire physical control?

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Edwards v. Arizona, 451 U. S. 477, 68 L. Ed. 2d 378,
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Fare v. Michael C., 442 U. S. 707, 61 L. Ed. 2d 197,
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United States v. Brignoni-Ponce, 422 U. S. 873,
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United States v. Calandra, 414 U. S. 338, 38 L. Ed. 2d 561,
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United States v. Cortez, 449 U. S. 411, 66 L. Ed. 2d 621,
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United States v. Martinez-Fuerte, 428 U. S. 543, 49 L. Ed. 2d 1116, 96 S. Ct. 3074 (1976) 10

United States v. Mendenhall, 446 U. S. 544, 64 L. Ed. 2d 497, 100 S. Ct. 1870 (1980) 22

United States v. Place, 462 U. S. 696, 77 L. Ed. 2d 110, 103 S. Ct. 2637 (1983) 10

United States v. Robinson, 414 U. S. 218, 38 L. Ed. 2d 427, 94 S. Ct. 467 (1973) 19, 20

United States v. Sharpe, 470 U. S. 675, 84 L. Ed. 2d 605, 105 S. Ct. 1568 (1985) 25

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United States Constitution

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Treatises

W. LaFave & A. Scott, *Substantive Criminal Law* (1986) . . .17

W. LaFave, *Search and Seizure* (2d ed. 1987) 3, 16, 17

J. Wigmore, *Evidence* (Chadbourne rev. 1979) 13, 15

Miscellaneous

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Butterfoss, *Bright Line Seizures: The Need for Clarity in Determining When Fourth Amendment Activity Begins*, 79 J. Crim. L. & Criminology (1988) 17, 25

Dworkin, *Fact Style Adjudication and the Fourth Amendment in the Limits of Lawyering*, 48 Ind. L. J. 329 (1973) 21

LaFave, *"Case-By-Case Adjudication" versus "Standardized Procedures": The Robinson Dilemma*, 1974 S. Ct. Rev. 122 19

Oakes, *Studying the Exclusionary Rule in Search and Seizure*, 37 Chi. L. Rev. 665 (1970) 17

Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 Tex. L. Rev. 736 (1972) 17

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BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

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1. CJLF has received written consent of the parties to file this brief.

An overly complicated law of the Fourth Amendment can act as a great impediment to the police's ability to do their jobs, particularly in combating drugs. "Bright line" rules (1) allowing flight to justify a stop and frisk under *Terry* v. *Ohio*, 392 U. S. 1 (1968) and (2) requiring actual restraint before a "seizure" has been deemed to have occurred will simplify the duties of police officers and trial judges while retaining individual rights. This will aid the rights of victims and society which CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

At 10:00 p.m. on April 19, 1988, two Oakland police officers, Brian McColgin and Jerry Pertoso, were driving on patrol near Foothill Boulevard and 64th Avenue when they saw four youths standing near a red car parked by the curb. Petition for Certiorari ("Pet.") at 7. The youths saw the officers and ran away. The red car also drove off. *Ibid.* The officers decided to pursue because they thought some illegal drug activity had occurred. *Id.*, at 8.

When the officers got to where the youths fled from, Officer Pertoso left the patrol car and ran north to Foothill and then west on Foothill. *Ibid.* Respondent Hodari was then running east on Foothill. *Ibid.* When Hodari noticed he was running towards Officer Pertoso, he tossed a rock to the street. *Id.*, at 8-9. The rock was rock cocaine. *Id.*, at 9. Officer Pertoso then stopped Hodari, handcuffed him, and forced him to the ground. *Ibid.*

Hodari was charged as a juvenile with possession of cocaine. *Id.*, at 5. His suppression motion was denied by the trial court and the allegations against him were found to be true. *Id.*, at 5-6. The California Court of Appeal reversed, finding that the suppression motion should have been granted. *In re Hodari D.*, 265 Cal. Rptr. 79, 86 (Cal. App. 1989).

SUMMARY OF ARGUMENT

Flight by itself should be considered "reasonable suspicion" to justify a stop and frisk under *Terry* v. *Ohio*, 392 U. S. 1 (1968). Such a *per se* rule would advance *Terry*'s purpose of allowing officers to do their jobs effectively while limiting their discretion to intrude upon the privacy of individuals.

The use of the exclusionary rule as the primary means of enforcing the Fourth Amendment creates a need for bright line rules. As the exclusionary rule enforces the Fourth Amendment through deterring illegal police conduct, the exclusionary rule will not work unless police can understand and judges apply consistently the requirements of the Fourth Amendment. Bright line rules will simplify the duties of police officers and judges while retaining individual rights. Requiring (1) actual restraint for seizure to occur under the Fourth Amendment, and (2) allowing flight to justify a *Terry* stop and frisk, are two helpful bright line rules that this Court can enunciate in the present case.

ARGUMENT

I. Defendant's flight justified a stop under *Terry* v. *Ohio*.

A. The Terry Standard.

When this Court applied the exclusionary rule to the states in *Mapp* v. *Ohio*, 367 U. S. 643 (1961), the power of the Fourth Amendment was dramatically increased, influencing virtually every criminal prosecution in this country. The rise of the Fourth Amendment, however, put its jurisprudence under increasing strain. An amendment that arose from the abuses of English customs officials, see 1 W. LaFave, *Search and Seizure* § 1.1(a), at 4 (2d ed. 1987), now had to deal with the core functions of modern American police work. These difficulties were compounded by the text of the Fourth Amend-

ment.[2] The text "has 'both the virtue of brevity and the vice of ambiguity' " and is thus difficult to interpret. *Id.*, at 5. The many problems of dealing with the Fourth Amendment in modern society eventually found their way to the chief interpreter of the Fourth Amendment, this Court.

Terry v. *Ohio*, 392 U. S. 1 (1968) helped fit the Fourth Amendment to modern times. *Terry* involved one of the most common and important parts of police work, a "confrontation on the street between the citizen and the policeman investigating suspicious circumstances." *Id.*, at 4. Cleveland Police Detective Martin McFadden, a veteran of 39 years police work, observed Terry and two other people engaging in what appeared to McFadden to be " 'casing a job, a stick-up.' " Believing this was a time for action, Officer McFadden approached the men, identified himself as a police officer, and asked them for their names. After receiving an inaudible response, Officer McFadden grabbed Terry, spun him around, and patted him down. He eventually found a pistol on Terry's person. *Id.*, at 5-7.

The *Terry* Court found that Officer McFadden's acts did not violate the Fourth Amendment. While defendant had Fourth Amendment interests in his stop and search, *id.*, at 9, the *Terry* Court understood that police had a great stake in protecting the legality of the "stop and frisk." *Id.*, at 10. The interests of the public in successful law enforcement, when combined with the relatively less intrusive nature of a stop and frisk, convinced the *Terry* Court to accept the legitimacy of the stop and frisk.

The proponents of the stop and frisk "argued that in dealing with the rapidly unfolding and often dangerous situations

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2. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

on city streets the police are in need of an escalated set of flexible responses, graduated in relation to the amount of information they possess." *Id.*, at 10. According to its proponents, there is a difference between a "stop" and a "seizure" and a "frisk" and a "search." These differences would allow an officer to make the less intrusive stop and frisk with less than probable cause. *Ibid.* The opponents of the stop and frisk would apply one standard to all police activities. "The heart of the Fourth Amendment, the argument runs, . . . is a severe requirement of specific justification for any intrusion upon protected personal security, coupled with a highly developed system of judicial controls to enforce upon the agents of the state the commands of the Constitution." *Id.*, at 11. They urged that any loosening of the standards governing police conduct "would constitute an abdication of judicial control over, and indeed an encouragement of, substantial interference with liberty and personal security by police officers . . . . " *Id.*, at 12.

The *Terry* Court approached this case "mindful of the limitations of the judicial function in controlling the myriad daily situations in which policemen and citizens confront each other on the street." *Ibid.* It also recognized that the thrust of the exclusionary rule is deterring unlawful conduct by the police. *Ibid.* Because there would be times when the exclusion of evidence would not deter police conduct, courts had to be cognizant of when their sanctions against the police would be futile. *Id.*, at 14. Given the great diversity of street encounters between police and citizens, see *id.*, at 13, "a rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime." *Id.*, at 15.

The practical bent of the *Terry* Court extended to its analysis of the particular facts in the case. It recognized that it would be impractical to hold the stop and frisk to the requirements of the Warrant Clause, as it involved "necessarily swift action predicated upon the on-the-spot observations of the officer on the beat — which historically has not been, and as a practical matter could not be, subjected to the warrant proce-

dure." *Id.*, at 20. Instead, the Court simply looked to the reasonableness of Officer McFadden's actions. Using the test found in *Camara* v. *Municipal Court*, 387 U. S. 523 (1967), it balanced the need for the stop and frisk against the invasion of privacy entailed by these acts. *Terry*, *supra*, 392 U. S., at 21.

The assessment of the government interests shows the central theme of this opinion. The most important justification for Officer McFadden's decision to approach defendant and his companions was that this decision was part of the core of police work, "effective crime prevention and detection." *Id.*, at 22. If Officer McFadden is to do his job properly, he must be allowed to stop and investigate individuals who act in a manner such as defendant. "It would have been poor police work indeed for an officer of 30 years experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further." *Id.*, at 23. The need to let police do their jobs is also reflected in the *Terry* Court's recognition of the police officer's need to make sudden decisions. See *id.*, at 20. *Terry* recognizes that the exclusionary rule "cannot properly be invoked to exclude the products of legitimate police investigative techniques on the ground that much conduct which is closely similar involves unwarranted intrusions upon constitutional protections." *Id.*, at 13. Finally, the *Terry* Court justified the frisk of defendant for practical reasons. The Court recognized that police work can be dangerous and there are many times when an officer must be allowed to pat down a suspect so that he may do his job safely. See *id.*, at 23-24.

The *Terry* Court did not leave police officers with unfettered discretion. To justify "the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant intrusion." *Id.*, at 21. Given the balance of government and citizen interests, these facts and inferences did not have to constitute probable cause, but only had to allow an officer "reasonably to conclude in light of his experience that criminal activity is afoot and that the persons with whom he is dealing may be armed and presently dangerous . . . . " *Id.*, at 30. Thus a balance is struck between two

absolutes. The *Terry* Court avoids treating street encounters like searches of dwellings. To do so would stifle police activity on the streets. At the same time, the decision does not give police unfettered discretion to stop people on the streets. By requiring the officer to have specific justification for the stop and frisk, the *Terry* Court brings these encounters into the mainstream of Fourth Amendment law, see *id.*, at 21 n. 18, while recognizing the many practical difficulties encountered by police operating on the streets.

B. Terry's Progeny.

While this Court has never determined whether flight alone can justify a *Terry* stop, the subsequent interpretations of *Terry* show a pattern of deference to limited police intrusions. So long as the justification given for the intrusion acts to limit police discretion, this Court has deferred to the needs of police to respond to imminent criminal activity without the fear of judicial second-guessing.

The closest case this Court has had to the present one was a companion case to *Terry*, *Sibron* v. *New York*, 392 U. S. 40 (1968).[3] In *Sibron*, an off duty police officer surprised two men who were acting furtively in his apartment building's hallway. *Id.*, at 48. Upon seeing them flee, he pursued. He caught, arrested, and searched one of the suspects. *Id.*, at 48-49.

The search was upheld as incident to a lawful arrest. *Id.*, at 66. Defendant's flight was a major factor in the probable cause determination. *Id.*, at 66-67. While the *Sibron* Court relied on several factors in addition to flight to justify the arrest, this does not mean that flight alone cannot justify a *Terry* stop. The *Sibron* Court used these factors to find probable cause to make an arrest. *Id.*, at 66. A *Terry* stop is less intrusive than an arrest, however, see *Terry*, *supra*, 392 U. S., at 20,

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3. This portion of the *Sibron* opinion deals with a joined case, *Peters* v. *New York*.

and thus requires a lower level of proof than probable cause. See *id.*, at 30. Given the different requirements for an arrest and *Terry* stop, it would not be inconsistent with *Sibron* to allow flight to justify a *Terry* stop. While flight was one of the several factors that combined to give overwhelming probable cause to arrest, it was clearly among the most important factors, being one of the two "strong indicia of mens rea" cited by the *Sibron* Court, *id.*, at 66, demonstrating the importance of this type of evidence.

Since *Terry*, this Court has steadily supported the authority of police officers to conduct various stops and frisks without the threat of undue judicial interference. One notable example is found in *United States* v. *Cortez*, 449 U. S. 411 (1981). *Cortez* involved an investigative stop of a vehicle made after Border Patrol officers deduced, by observing various footprints at a border crossing, that groups of illegal aliens were being led across the border on foot and then transported further via vehicle. The officers used this deduction and their knowledge that certain types of vehicles are used to carry illegal aliens to stop defendant's vehicle. After conducting an immigration check, agents found six illegal aliens hiding in defendant's camper. *Id.*, at 413-416.

The *Cortez* Court recognized that under *Terry* and other cases, this investigatory stop "must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *Id.*, at 417. There were two criteria for making this decision. "First, the assessment must be based upon all of the circumstances. The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers." *Id.*, at 418. These data then allow officers to make inferences or deductions that an average person might be incapable of reaching. *Ibid.* "The second element . . . is the concept that the process just described must raise a suspicion that the particular individual being stopped is engaged in wrongdoing." *Ibid.*

These two requirements did not, however, straitjacket the police. Behind the *Cortez* decision was the realization that this "process does not deal with hard certainties, but with probabilities." *Ibid.* The officers' privilege to draw conclusions from a certain set of circumstances simply reflects what had long been common practice. "Long before the law of probabilities was articulated as such practical people formulated certain common sense conclusions about human behavior; jurors as fact-finders are permitted to do the same — and so are law enforcement officers." *Ibid.* Thus, the evidence collected and conclusions drawn "must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *Ibid.*

When viewed from this perspective, the action of the Border Patrol became readily acceptable. The *Cortez* Court reviewed each of the Border Patrol's observations and deductions and found the whole logical chain flawless. *Id.*, at 419-421. "We see here the kind of police work often suggested by judges and scholars as examples of appropriate and reasonable means of law enforcement." *Id.*, at 419.

The need for police to be able to do their jobs is recognized in other post-*Terry* cases. In *Adams* v. *Williams*, 407 U. S. 143 (1972), Police Sergeant John Connally was driving alone on patrol duty when a person known to the sergeant approached the car and told him that a person seated in a nearby car was carrying narcotics and had a gun at his waist. *Id.*, at 144-145. After calling for assistance, Sergeant Connally approached the vehicle and asked the occupant to leave the car. When the occupant rolled down the window, Sergeant Connally reached into the car to where he thought a gun would be, and took a loaded revolver from defendant's waistband. *Id.*, at 145. In upholding this stop and frisk, the *Adams* Court emphasized the need to allow police to do their jobs.

> "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry recognizes that it may be*

the essence of good police work to adopt an intermediate response." *Id.*, at 145 (emphasis added).

Part of an officer's job is ensuring his own safety while conducting his duties. Thus an officer making a *Terry* stop "should not be denied the opportunity to protect himself from attack by a hostile suspect." *Id.*, at 146. As long as an officer is justified in making a forcible stop, he may also pat down the suspect for weapons. *Ibid.* Therefore, as Sergeant Connally properly responded to an informant's tip, he could search defendant for the weapon he suspected defendant of possessing. *Id.*, at 147-148.

Terry's basis in common sense has allowed this Court to apply it to situations beyond those which first brought about the ruling. *Terry* initially dealt with street encounters where a police officer believed a crime was about to take place. *Terry*, *supra*, 362 U. S., at 30. Since then, *Terry* has been applied to Border Patrol checkpoints (*United States* v. *Martinez-Fuerte*, 428 U. S. 543, 567 (1976)); automobile stops (*Cortez*, *supra*, 449 U. S., at 417); and "sniff tests" of airport luggage (*United States* v. *Place*, 462 U. S. 696, 697-698 (1983)). *Terry* has been expanded to include investigation of crimes that have already been completed. *United States* v. *Hensley*, 469 U. S. 221, 229 (1985). The post-*Terry* decisions have also recognized that *Terry* is not just a method for allowing a law enforcement officer to protect himself. A general interest in law enforcement can be enough to justify a *Terry* stop. See *Place*, *supra*, 462 U. S., at 703-704. The many different uses of *Terry* reiterates the practical essence of this decision.

Terry does not, however, present police officials with a blank check. An officer can only stop a person after developing an articulable suspicion supported by more than rumor that the person may be involved in some suspicious activity. See *Terry*, *supra*, 392 U. S., at 21. This is intended to prevent an officer from making *Terry* stops with unfettered discretion.

Time and again the cases in which this Court has invalidated *Terry* stops turned on whether an officer's justification for the stop sufficiently limited his discretion. Thus, in *Brown* v. *Texas*, 443 U. S. 47 (1979), this Court castigated the police for making a stop for the sole reason that the suspect looked suspicious.[4] *Id.*, at 49. The primary reason behind the reversal was to limit the discretion of police officers. "A central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions *solely at the unfettered discretion of the officers in the field.*" *Id.*, at 51 (emphasis added).

Another example of conduct exceeding the limits of *Terry* is found in *United States* v. *Brignoni-Ponce*, 422 U. S. 873 (1975). Here, Border Patrol agents operating a roving patrol for illegal immigrants stopped a car near the Mexican border with no justification other than the vehicle's occupants appeared to be of Mexican descent. *Id.*, at 875. The Court rejected this as the sole justification for a *Terry* stop, recognizing that it placed too much discretion in the hands of Border Patrol officials.

> "In the context of border area stops, the reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the Government . . . . To approve roving-patrol stops of all vehicles in the border area, without any suspicion that a particular vehicle is carrying illegal immigrants, would subject the residents of these and other areas to potentially unlimited interferences with their use of the highways, *solely at the discretion of Border Patrol Officers.*" *Id.*, at 882 (emphasis added).

Terry was decided with the recognition that the police encounter many difficult situations when working in the field. The needs of the police and the rights of individuals are balanced by allowing relatively unintrusive stops and frisks so long as some legitimate law enforcement goal justifies the intrusion. The only requirement is that the officer have some reasonable

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4. The officer then frisked defendant because he refused to identify himself and was in a "high drug problem area." *Id.*, at 49.

suspicion that the suspect is engaged in some suspicious activity. *Terry* is a practical case and it should be used in a practical manner. So long as the officer's discretion is sufficiently limited and the purpose of his actions are properly related to legitimate law enforcement goals, courts should not second-guess decisions made by officers in the field.

C. Terry and Flight.

A court reviewing a *Terry* stop and frisk examines it under the general reasonableness requirement of the Fourth Amendment. *Terry*, *supra*, 392 U. S., at 20. The reasonableness of the stop and frisk is determined by balancing the need for the search with the scope of the invasion. *Id.*, at 20-21. The Court of Appeal contradicted the purpose of *Terry* when weighing the costs and benefits of Officer Pertoso's decision to pursue and detain respondent.[5] The court, citing California Supreme Court precedent, determined that flight alone cannot justify a *Terry* stop. *In re Hodari D.*, 265 Cal. Rptr. 79, 84 (Cal. App. 1989) (citing *People* v. *Aldridge*, 35 Cal. 3d 473, 478, 674 P. 2d 240, 242-243 (1984)).

Other than stating that flight is insufficient justification and that there was no other justification for the stop, the court below engaged in only cursory analysis of the propriety of the stop. The court cited *Wong Sun* v. *United States*, 371 U. S. 471 (1963) to support its holding that flight does not justify a *Terry* stop. *Hodari D.*, *supra*, 265 Cal. Rptr., at 84. *Wong Sun* is distinguishable, however, because it dealt with a probable cause determination. *Wong Sun*, *supra*, 371 U. S., at 479. By simply dismissing flight as a justification for a *Terry* stop, the court below avoids the balancing approach that has been taken by this Court in *Terry* and its progeny, and thereby avoids recognizing the great burden the court's decision places on the police officer in the field.

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5. Amicus agrees with California's position that respondent was not seized until physically stopped by Officer Pertoso. See part II. B. 1., *infra*, at 21-25.

An officer's decision to initiate a *Terry* stop "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." See *Graham* v. *Conner*, 109 S. Ct. 1865, 1872, 104 L. Ed. 2d 413, 455 (1989) (use of force at *Terry* stop). The officers in the present case drove towards a group of young men huddled together who fled as the officers' car approached. Pet. at 7. The officers were then presented with two choices: pursue or allow them to flee. In deciding to pursue, the officers made a logical decision consistent with police practices that served a crucial government interest.

When a group of people flee at a person's approach, that person's suspicions naturally will be aroused. The suspicion will be all the greater when the person fled from is a police officer. Flight has long been recognized as evidence of a guilty mind. See *Sibron* v. *New York*, 392 U. S. 40, 66 (1968); 2 J. Wigmore, *Evidence* § 276, at 122 (Chadbourne rev. 1979).[6] Thus an officer will pursue a fleeing individual to see what he has done to make him want to flee. This is what happened in the present case. Pet. at 8.

Pursuing a fleeing person makes even more sense when the police officer's role is taken into account. A primary function of the police officer is investigation. See *Miranda* v. *Arizona*, 384 U. S. 436, 477 (1966) The investigative powers of the police can be aimed at past, future, or current criminal conduct. See *United States* v. *Hensley*, 469 U. S. 221, 227-228 (1985). As flight is indicative of a guilty mind, it would be bad police practice to not investigate why the youths fled. Cf. *Terry*, *supra*, 392 U. S., at 23. *Terry* was never intended to punish officers for good, aggressive investigation. See *United States* v. *Cortez*, 449 U. S. 411, 419 (1981).

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6. It is unclear whether respondent knew that the car that drove towards the youths contained police officers. See *Hodari D.*, *supra*, 265 Cal. Rptr., at 81. Even flight from strangers, absent any innocent explanation, is an indication of a guilty mind. *Sibron*, *supra*, 392 U. S., at 66.

Balanced against the interest of police officers in doing good work is defendant's interest in not being pursued and stopped. A person who has done nothing to arouse suspicion towards himself has a right not to have contact with or be questioned by the police. Therefore, if respondent wanted to avoid contact with the police and the police had no articulable suspicion of criminal conduct on his part, then the police must let him go. This was the basis of the Court of Appeal's decision to invalidate the *Terry* stop. It felt that allowing flight to justify a *Terry* stop would eliminate a person's right to avoid contact with police. Any attempt by a citizen to exercise his right to terminate an encounter with an officer, the argument goes, would automatically subject the citizen to a *Terry* stop. *Hodari D.*, *supra*, 265 Cal. Rptr., at 84.

The problem with this decision is that it fails to take into account that there are many different ways of ending an encounter with police. A simple straightforward denial of a police request will not provide the officer with cause for a *Terry* stop. Thus a simple refusal to identify oneself cannot justify a frisk. See *Brown* v. *Texas*, 443 U. S. 47, 49, 53 (1979). Similarly, a person is entitled to walk away from a police officer when asked to stop and respond to questioning. See *Smith* v. *United States*, 558 A. 2d 312, 317 (D. C. App. 1989) (walking at "fast pace" but not "bolting" or "running" does not justify stop).

Respondent's actions, however, were not innocent. He did not simply assert his right to avoid contact, he and his compatriots ran as they saw the officers' car approach. Pet. at 8. This indicated to the police that respondent had a guilty mind, *ibid.*, and demonstrated that he may have known that the unmarked car was a police car. Both items are worthy of investigation and both were given to the officers by respondent. Had respondent simply walked away, see *Smith*, *supra*, or had he simply held his ground and refused to answer any questions posed to him by the officers, see *Brown*, *supra*, there would have been no grounds for a *Terry* stop.

As it was respondent's own decision to flee that imparted this information to the officers, he should not be allowed to use any right to avoid contact to negate the officers' reasonable suspicion. The Court of Appeal's reasoning, if upheld, would make it impossible for an officer to pursue someone who flees from his presence. "The fact of flight itself is significant; it becomes most significant when after all no explanation is forthcoming." 2 Wigmore, *supra*, § 276 at 129. These questions deserve answering. The need to answer these questions provide more than the reasonable suspicion necessary to justify a *Terry* stop.

The reasonable suspicion requirement was affixed to *Terry* to limit police discretion.[7] Flight provides exactly the type of objective basis for suspicion that properly limits the discretion of the officer in the field. Flight is both self-evident and articulable. It does not conjure up some vague and subjective standard. Cf. *Brown* v. *Texas*, *supra*, 443 U. S., at 49 (suspect "looked suspicious"). It does not threaten arbitrary application, such as an officer's decision to pull a motorist over because he had nothing better to do. Cf. *Delaware* v. *Prouse*, 440 U. S. 648, 650-651 (1979). Flight is not indiscriminately applicable to a large number of innocent people. Cf. *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 885-886 (1975) (Mexican ancestry).

When someone flees when a police officer approaches, it is reasonable for an officer to want to pursue and stop him. The officer only has a few seconds to decide whether to pursue him. If the officer decides to let him flee, then in all likelihood the officer will never be able to determine why the person fled.

In the heat of the moment, Officers McColgin and Pertoso decided to find out what respondent was up to. In so doing, the officers did their jobs well. They were able to stop defendant, and they determined that he was engaging in criminal acts without arbitrarily infringing upon any of his rights. Good police work such as this deserves commendation, not condemnation.

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7. See part I. B., *supra*, at 10-12.

II. More bright lines need to be established regarding the propriety of searches and seizures under the Fourth Amendment.

A. The Need for Bright Lines.

The Fourth Amendment presents a dilemma for the legal system. Every arrest, search, and seizure of evidence made by any government official in this country must satisfy the requirements of the Fourth Amendment. Furthermore, matters wholly unrelated to searches and seizures, such as confessions, can be invalidated if they are sufficiently tainted by an improper search or seizure. See *Wong Sun* v. *United States*, 371 U. S. 471, 485 (1963). The difficulty with the Fourth Amendment, however, is that its text is very vague and therefore very difficult to interpret. See 1 W. LaFave, *Search and Seizure* § 1.1(a), at 5 (2d ed. 1987).

The problem of broad application but difficult interpretation is compounded by the method used to enforce the Fourth Amendment. The primary tool for enforcing the proscriptions of the Fourth Amendment is the exclusionary rule. See *id.*, at 7. The exclusionary rule is designed to enforce the Fourth Amendment by deterring police from violating it. See *United States* v. *Calandra*, 414 U. S. 338, 347 (1974). This compounds the difficulties behind the Fourth Amendment by placing the burden of interpreting the Fourth Amendment on police officers, people who are not always trained enough to be able to interpret every ambiguity of search and seizure law. Therefore, courts must provide some bright lines to allow police to be able to do their jobs properly while staying within the bounds of the Fourth Amendment.

If an officer cannot understand a particular rule, then the exclusionary rule is incapable of deterring him from violating it. It is no insult to police officers to say that the complexities of the Fourth Amendment can make it difficult for police to abide by it. The rules that govern the police under the Fourth Amendment come from decisions written by judges for lawyers. Under our common law system, these decisions are subject to constant modification by the courts to fit each new situ-

ation. The end result can be a web of precedents designed for and only usable by attorneys. The law of search and seizure is so complicated that the major treatise on the matter is over 2,500 pages long, see LaFave, *supra*.[8] It is easy to understand why the complexity of Fourth Amendment law is a major stumbling block behind its successful enforcement through the exclusionary rule. See Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 Tex. L. Rev. 736, 740-741 (1972); Oakes, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665, 731 (1970).

Another problem with Fourth Amendment law is inconsistent application by the courts. A problem with some Fourth Amendment decisions of this Court is that different courts will reach different results on the legality of factually similar searches. See Butterfoss, *Bright Line Seizures: The Need for Clarity in Determining When Fourth Amendment Activity Begins*, 79 J. Crim. L. & Criminology 437, 458-459 (1988). Fourth Amendment claims are not subject to the same degree of review as other federal constitutional claims, see *Stone* v. *Powell*, 428 U. S. 465 (1976), so it is important that trial courts have clear guidelines for producing consistent results. Furthermore, a seemingly arbitrary application of the exclusionary rule by lower courts will add to the public's alienation when the guilty go free because of an officer's error. See *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 412 (1971) (Burger, C. J., dissenting).

One way to alleviate these problems is by providing the courts and police with well-defined standards. These "bright lines" will make it much easier for the police and courts to understand what conduct is expected under the Fourth Amendment, thereby preventing post-hoc judicial second-guessing of police.

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8. In comparison it took Professor LaFave only around 1200 pages to explain all of the substantive criminal law, see W. LaFave & A. Scott, *Substantive Criminal Law* (1986).

This Court has recognized the need for some bright lines in previous Fourth Amendment cases. In *New York* v. *Belton*, 453 U. S. 454 (1981), this Court was confronted with the issue of what was the permissible scope of a search of an automobile incident to a lawful arrest. *Id.*, at 455. In *Belton*, a New York State policeman pulled a vehicle over for excessive speeding and was able to determine that none of the four occupants owned the car and that marijuana was present inside the car. *Id.*, at 455-456. He ordered the occupants out, and after finding an envelope containing marijuana in the car, placed them under arrest. After separating the four men and reading them their *Miranda* warnings, the police officer searched the passenger compartment of the car. On the back seat of the car he found a jacket that belonged to defendant Belton, unzipped one of the jacket pockets, and found cocaine. The New York Court of Appeals reversed Belton's conviction, holding that the officer had no right to search Belton's jacket as there was no danger that Belton or a confederate could gain access to the jacket. *Id.*, at 456.

This Court reversed. It based its decision on the need to simplify the law of searches incident to a lawful custodial arrest. Since *Chimel* v. *California*, 395 U. S. 752 (1969), this Court had recognized that a lawful custodial arrest creates a situation where the requirements of the Warrant Clause had to be partially suspended. An officer was entitled to make a contemporaneous warrantless search of the person arrested and the immediately surrounding area " 'to remove any weapons that [the arrestee] might seek to use in order to resist arrest or effect his escape' . . . ." *Belton*, *supra*, 453 U. S., at 457 (quoting *Chimel*, *supra*, 395 U. S., at 763).

The problem with the *Chimel* standard was that while "the principle that limits the search incident to a lawful custodial arrest may be stated clearly enough, courts have discovered the principle difficult to apply in specific cases." *Belton*, *supra*, 453 U. S., at 458. Yet the goals of the Fourth Amendment could "only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement." *Ibid.*

quoting LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 S. Ct. Rev. 127, 142.

The *Belton* Court understood that the Fourth Amendment had to deal with the day-to-day activities of the police. *Ibid.* Therefore " '[a] highly sophisticated set of rules qualified by all sorts of ifs, ands, and buts' " while entertaining to lawyers and judges, was not the type of standard that could be applied to officers in the field. *Ibid.* "In short, '[a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.' " *Ibid.* quoting *Dunaway* v. *New York*, 442 U. S. 200, 213-214 (1979). Everybody was harmed by vague standards. "When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority." *Id.*, at 459-460. Thus a bright line separating permissible from impermissible conduct had to be drawn.

Belton held that whenever an officer makes a lawful custodial arrest of the occupant of an automobile, the officer is entitled to search the passenger compartment of the vehicle. *Id.*, at 460. This holding retreats somewhat from the principles announced in *Chimel*. There will be times when the containers searched under the rule announced in *Belton* could not possibly carry a weapon nor evidence relating to the conduct for which the suspect was arrested. *Id.*, at 461. Nonetheless, the *Belton* Court adhered to the bright line rule. It recognized that in order to have a workable rule it had to generalize the prescriptions of *Chimel* to a broader, more easily defined rule.

Another example of this Court's desire to avoid overly complicated rules is found in another search incident to a lawful arrest case, *United States* v. *Robinson*, 414 U. S. 218 (1974). Defendant was arrested for driving without a license. The court of appeals in *Robinson* limited the authority of the arresting officer to a pat down for weapons and a search for any evidence of the crime for which the suspect was arrested.

Id., at 227. As there could be no further evidence to be obtained from Robinson relating to the charge of driving without a license, the court of appeals held that the arresting officer only had authority to conduct a frisk for weapons. *Ibid.*

The *Robinson* Court rejected this rule. A key reason behind this decision was the need to simplify the law of search and seizure.

> "But quite apart from these distinctions, our more fundamental disagreement with the Court of Appeals arises from its suggestion that there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest. . . . A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick *ad hoc* judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search." *Id.*, at 235.

Therefore the *Robinson* Court adopted a much simpler rule, granting officers authority to conduct a full search incident to any lawful arrest. *Ibid.*

This Court has used bright lines in other areas of criminal procedure. An important example of this work exists in the law of confessions. *Miranda* v. *Arizona*, 384 U. S. 436, 467 (1966) adopted a rule declaring all custodial confessions to be inherently coercive unless certain safeguards of the suspects rights were followed. The rule in *Miranda* would not allow a court to use the facts of a particular case beyond determining whether the guidelines were followed. *Id.*, at 468-469. Instead, the *Miranda* Court supplied a set of concrete guidelines for courts and police to follow. *Id.*, at 441-442.

Another example of a bright line rule is found in *Edwards* v. *Arizona*, 451 U. S. 477, 484-485 (1981), where this Court held that once a suspect undergoing custodial interrogation asks for counsel, interrogation must cease until the suspect's counsel

arrives or the suspect unilaterally decides to revive his interrogation. This Court has "repeatedly emphasized the virtues of following a bright line rule in cases following *Edwards* as well as *Miranda*." *Arizona* v. *Roberson*, 486 U. S. 675, 681 (1988). The need for bright lines was reiterated in *Fare* v. *Michael C.*, 442 U. S. 707, 718 (1979):

> "Whatever the defects, if any, of this relatively rigid requirement that interrogation must cease upon the accused's request for an attorney, *Miranda*'s holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible."

These reasons apply with equal strength to the Fourth Amendment. For the exclusionary rule to succeed, the law of the Fourth Amendment "must be clear, unambiguous, not susceptible to quibbles or easy avoidance, and easily understandable by the persons sought to be deterred." Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 Ind. L. J. 329, 333 (1973). So long as the exclusionary rule is the principal means of enforcing the Fourth Amendment, this Court will need to develop bright line rules to allow the police and courts to understand and apply the requirements of the Fourth Amendment.

B. Two Bright Lines can be Applied to the Present Case.

1. Restraint and seizure.

One area of Fourth Amendment law in which a bright line would be useful is in defining the term "seizure." Traditionally, seizure is defined as "[t]o grasp suddenly and forcibly; take or grab." *The American Heritage Dictionary*, 1111 (2d College ed. 1987). In defining what constitutes a seizure of a person under the Fourth Amendment, this Court has moved away from this view towards a subjective definition of when a person is seized. By focusing on when a person thinks he is seized, the decisions of this Court have added an unnecessary layer of

uncertainty to the Fourth Amendment. A return to the traditional meaning of seizure will eliminate uncertainty while retaining the balance between police powers and individual rights under the Fourth Amendment.

In *United States* v. *Mendenhall*, 446 U. S. 544 (1980), this Court took up the issue of what constituted a seizure of a person under the Fourth Amendment. In *Mendenhall*, DEA agents identified defendant as a possible drug courier as she disembarked from a commercial flight at Detroit Metropolitan Airport. *Id.*, at 547. As she walked through the concourse, the agents approached her, identified themselves, and asked to see her identification and airline ticket. *Id.*, at 547-548. They questioned her and one agent asked her to accompany him to the DEA office for further questions. She did so and consented to a search of her handbag and her person inside the office. *Ibid.* Heroin was found on her person. *Id.*, at 549.

Two members of the majority, Justices Stewart and Rehnquist, found no seizure when defendant was questioned in the concourse. *Id.*, at 555. They determined that "a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained." *Id.*, at 553. Therefore, "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.*, at 554.[9] This test was adopted by a majority of this Court in *INS* v. *Delgado*, 466 U. S. 210, 215 (1984). *Delgado*, like *Mendenhall*, involved "an initially consensual encounter," *ibid.*, and not a fleeing suspect.

The most recent application of this standard is found in *Michigan* v. *Chesternut*, 486 U. S. 567 (1988). The question in

9. Three other justices chose not to reach the question of whether a seizure occurred but instead found that the federal agents had a reasonable suspicion to stop defendant for questioning. *Id.*, at 560 (Powell, J., concurring).

Chesternut was whether officers "seized" defendant when they drove alongside him in a marked patrol car while he was running from them. *Id.*, at 569. The Court found that no seizure had taken place. The majority rejected Michigan's and defendant's request to formulate bright line rules to govern investigatory pursuits. *Id.*, at 572. Instead, the *Chesternut* Court decided to "adhere to our traditional contextual approach, and determine only that, in this particular case, the police conduct in question did not amount to a seizure." *Id.*, at 573.

The majority recognized that the *Mendenhall* test was "necessarily imprecise" as it focused on the entirety of police action rather than focusing on a few isolated details. *Id.*, at 573. Furthermore, the Court understood that the concept of "what constitutes a restraint on liberty prompting a person to conclude that he is not free to leave will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs." *Ibid.* Nonetheless, the majority felt the *Mendenhall* standard retained sufficient objectivity by "looking to the reasonable man's interpretation of the conduct in question . . . ." *Id.*, at 574.

Applying the *Mendenhall* standard to the facts of the case, the *Chesternut* Court concluded that defendant was not seized before he discarded the packets. *Ibid.* The act of chasing defendant did not necessarily mean that detention was imminent. *Id.*, at 574-575. Here "[t]he record does not reflect that the police activated a siren or flashers; or that they commanded respondent to halt or displayed any weapons; or that they operated the car in an aggressive manner to block respondent's course . . . . " *Id.*, at 575. As the officers did no more than accelerate and drive parallel to defendant, they did not so intimidate defendant as to make him believe that he was not free to go about his own business. *Ibid.* Because of the flexibility of the *Mendenhall* test, the *Chesternut* Court did not have to articulate any rule that went beyond the particular facts present in *Chesternut*. Therefore, the Court concluded "only that in this particular case, the police conduct in question did not amount to a seizure." *Id.*, at 573.

Justice Kennedy, in a concurrence joined by Justice Scalia, provides a more practical alternative. While the concurrence pays heed to the reasonable belief rule of *Mendenhall* and *Delgado*, see *id.*, at 577 (Kennedy, J., concurring), it advances the idea "whether or not the officers conduct communicates to a person a reasonable belief that they intend to apprehend him, such conduct does not implicate Fourth Amendment protections *until it achieves a restraining effect.*" *Id.*, at 577 (emphasis added). This idea was expanded in *Brower* v. *County of Inyo*, 109 S. Ct. 1378, 103 L. Ed. 2d 628 (1989). In *Brower*, an action under 42 U. S. C. § 1983, the Court stated that no seizure in violation of the Fourth Amendment could occur unless there was "an intentional acquisition of physical control" by the police. *Id.*, at 1381, 103 L. Ed. 2d, at 635. This passage of *Brower* strongly implies that when the suspect flees rather than stopping on command, there has been no seizure until the moment of effective physical restraint.

The problems with the subjectivity of the *Mendenhall* rule can be seen in the California Court of Appeal's treatment of the present case. The court below determined that Officer Pertoso's simple act of chasing respondent constituted a seizure. *In re Hodari D.*, 265 Cal. Rptr. 79, 83 (1989). It reaches this conclusion in spite of the similarity between this case and *Chesternut*. The only major difference between *Chesternut* and the present case is that in *Chesternut* the officers drove parallel to the suspect, while in the present case, Officer Pertoso ran toward respondent in an effort to cut him off. *Ibid.* Yet this was enough to turn a chase into a seizure. *Ibid.*

The decision in *Chesternut* does not provide courts with much guidance. The *Chesternut* Court did indicate that an attempt to cut someone off with a car could make it more likely that a seizure occurred. *Chesternut*, *supra*, 486 U. S., at 575. This decision did not, however, state how much weight should be given this factor, nor did it state whether pursuit on foot was as intimidating as being chased by a car. *Ibid.* As the *Chesternut* decision only applied to the facts of that particular case, *id.*, at 573, there was no way to know what would constitute a seizure under *Chesternut*. The lack of guidance that the courts have received from *Mendenhall*, *Delgado*, and *Chesternut* is demonstrated by other courts' inconsistent interpretation of *Mendenhall*. See Butterfoss, *Bright Line Seizures: The Need for Clarity in Determining When Fourth Amendment Activity Begins*, 79 J. Crim. L. & Criminology 437, 458-459 (1988).

Applying a bright line rule requiring a fleeing suspect to be actually in the control of an officer for a Fourth Amendment seizure to occur solves the problems presented by the *Mendenhall* standard in the present case. Thus when a suspect flees from an officer and does not heed any commands to stop, he is not seized until the officer asserts physical control over him. See *Brower*, *supra*, 109 S. Ct., at 1381, 103 L. Ed. 2d, at 635. While a different standard may apply when a person stops at the command of an officer, see *Mendenhall*, *supra*, 446 U. S., at 547, the present case does not raise the issue. See Pet. at 8-9. As Hodari was still fleeing from Officer Pertoso when he discarded the rock cocaine, Pet. at 9, the cocaine was not the product of a seizure.

Allowing courts to engage in case-by-case adjudication of what constitutes a seizure will create enormous inconsistencies. "A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished." *United States* v. *Sharpe*, 470 U. S. 675, 686-687 (1985). In drug cases, this inconsistency will be particularly damaging. A drug case is usually decided by the suppression motion. Applying a subjective standard to so important an issue can play havoc with the nation's enforcement of drug laws. Replacing the *Mendenhall* test with the bright line of actual control will add needed consistency to the enforcement of our drug laws.

2. Flight and bright lines.

Another area where a bright line rule would be useful is in determining what constitutes sufficient justification for a stop and frisk under *Terry* v. *Ohio*, 392 U. S. 1 (1968). *Terry* deals with a wide variety of encounters between officers and civilians. *Id.*, at 12. Thus no single rule can govern every possible *Terry* encounter. See *Sharpe*, *supra*, 470 U. S., at 685-686.

While every *Terry* situation cannot be covered by one rule, this Court can demonstrate that certain facts, when known to the officer, will always justify a *Terry* stop.

Terry's greatest virtue, its flexibility, can also be its greatest vice. While *Terry* must be flexible enough to deal with many different encounters between officer and citizen, this flexibility can lead to the problems of inconsistent application and incomprehensible standards. These problems can be particularly harmful in *Terry* situations. *Terry* frequently deals with situations in which an officer's life may be in danger. See *Terry*, *supra*, 392 U. S., at 23-24. Furthermore, the decision to make a *Terry* stop often involves "necessarily swift action predicated upon the on-the-spot observations of the officer on the beat . . . ." *Id.* at 20. Therefore, easily understood guidelines would be very helpful to an officer deciding whether to make a *Terry* stop.

The present case demonstrates the need for such a guideline. Flight is strongly indicative of a guilty mind and raises important questions that a good police officer should try to answer.[10] Allowing flight to justify a *Terry* stop also sufficiently limits police discretion to preserve the rights that *Terry* was intended to protect.[11] Therefore, an officer seeing someone flee from his presence can make the split-second decision to pursue without worrying about being second-guessed by the courts.

Terry was designed to advance certain practical goals. It was intended to allow police to react to various encounters with civilians without the burdens of the warrant requirement or probable cause while still limiting the discretion of the officer to interfere with an individual's privacy. Recognizing that certain facts invariably justify a *Terry* stop is a practical solution to the problems associated with *Terry*'s flexibility. Recog-

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10. See part I. C., *supra*, at 13.

11. See part I. C., *supra*, at 15.

nizing that flight justifies a *Terry* stop and frisk would advance the primary goal of *Terry* — allowing police to do their jobs.

CONCLUSION

The decision of the California Court of Appeal for the First Appellate District should be reversed.

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